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TO: Assembly Committee on Children and Family Law

FROM: Bob Andersen 

RE: AB 29, relating to modifications to legal custody or periods of physical placement contingent upon the occurrence of a specified future event or a specified change in conditions

DATE: March 7, 2007

Legal Action of Wisconsin, Inc. (LAW) is a nonprofit organization funded by the federal Legal Services Corporation, Inc., to provide legal services for low income people in 39 counties in Wisconsin. LAW provides representation for low income people across a territory that extends from the very populous southeastern corner of the state up through Brown County in the east and La Crosse County in the west. Family Law is one of the three major priority areas of law for our delivery of legal services (the other two are public benefits and housing).

1. **The Enactment of AB 29 Would Allow Legal Custody and Placement – Critically Affecting Children’s Welfare – to be Automatically Changed in the Future, Without Judicial Review. Current Law Requires the Court to Review the Circumstances in the Future to Protect the Children and Their Best Interests.**

- *One scenario that comes to mind is a conditional order that grants physical placement and legal custody to a person, who has a domestic abuse restraining order against him or her, once the person meets certain conditions – like completing counseling for batterers or drug and alcohol treatment. Under s. 767.41 (6)(g) of the statutes, a person who has engaged in a pattern or serious incident of interspousal battery has to meet certain conditions before physical placement or legal custody will be allowed. In these cases, it is important for the court to review the circumstances to make sure that the offender is rehabilitated before physical placement or custody are to be ordered. The problem in these situations is that physical placement and legal custody orders place an offender in proximity with the victim of abuse. Joint legal custody, for example, requires the parties to work together to share significant decision making, medical attention, education and the like.*

A conditional order under this bill will allow this to happen automatically, without any further review by the court.



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- *While this is especially true in a case where domestic violence has been present, it could also be true in other circumstances. What about a court order that makes a grant of physical placement or legal custody to a father conditioned on his meeting certain obligations, like complying with the terms of his physical placement schedule? Or an order that makes physical placement or legal custody conditioned on meeting some other term of the divorce, like a financial obligation? How about an order that says that certain housing conditions will be fixed in a couple of weeks and then the other parent can exercise physical placement?*

The imposition of conditions will most likely come from the party that is engineering the divorce – the plaintiffs.

Such conditions may take effect either in the *near future* or may take place in the *distant future*. A development that occurs years later certainly requires the review by a court at a later date to see how circumstances have changed – especially, when one is considering such a profound order as one affecting physical placement or legal custody.

- *I will give you an example of a real case in Milwaukee County. The parties divorced and the judge, thinking he could shape the mother's behavior, ordered that she could have joint legal custody and physical placement when she returned to the state. She went to Colorado. The only problem is that, instead of returning right away, as the judge thought would happen, she returned 5 years later and took over joint custody of the children!*

2. **In an Analogous Situation, the Court of Appeals for District IV in January 2007 Struck Down a Stipulation that Prohibited the Parties from A Future Revision of Child Support.**

The agreement of the parties was that

Neither party shall request a change in the amount of child support payments for a period of at least seven years from the date of the judgment entered herein, except as occasioned by catastrophic circumstances, specifically understood and agreed as being significantly greater than a substantial change in circumstances.

The court of appeals [*In re Marriage of Wood v. Propeck* (Cir. Ct. No. 1999FA1484) – recommended for publication] said as follows:

Even if the stipulation was fair when it was created, making a child support provision unmodifiable does not necessarily make the stipulation fair in the future. *Provisions preventing future determination of the best interests of the child may*

leave the child inadequately protected. Unforeseen changed circumstances may require support beyond the amount of waived or stipulated child support. . . . the present agreement is *contrary to public policy* and cannot be relied on to preclude Pamela from bringing her present motion [to increase child support because William's periods of physical placement have been reduced] [emphasis added].

While this case relates to child support, the same public policy considerations relate to legal custody and physical placement. It is critically important that an impartial tribunal be allowed to see what is in the best interest of the child.

3. **There is no Need for This Bill -- The Parties Can Agree to Change Custody and Physical Placement Any Time in the Future and Simply File a Stipulation with the Court. This Bill is Designed Only to Force People Who are Otherwise Disagreeable Into Conditions -- it is Not Designed for People Who are Truly Agreeable, as Has Often Been Argued.**

If the parties think that legal custody and physical placement should be changed in the future, they can agree to file a stipulation with the court at that time. Their stipulation can simply be signed by the court. If the court desires to hold a hearing to look at the situation, the court can do so, but it does not have to. So, people who favor this bill because they want to allow for a change to be made in the future -- for example to transfer physical placement and legal custody once the child reaches school age or attends a different school -- they can do it now, by stipulating when the time comes.

What is this bill all about then? It is to *force* people into conditions to change things in the future, when the fear is that they will not subsequently agree to make a change. But, what does that accomplish? When the time comes for the change to be made, the party who never liked the condition to begin with is going to go back to court and challenge the change. So, the parties end up back in court anyway and no savings has been achieved by this bill, contrary to one of the arguments that is made for the bill -- to save people from going back to court.

4. **The Enactment of the Bill will Invite Protracted Litigation**

The potential exists for lawyers and parties who bitterly oppose each other to put a bunch of conditions into the divorce judgment. The standard of the bill is only "events that are likely to occur in the future or temporary current conditions that affect the ability of one or both parties to make decisions in the best interest of the children or to perform parental duties and responsibilities or care for the child."

This standard is very vague. Lawyers or their parties may easily be able to characterize some current circumstances as only temporary and therefore impose conditions in the judgment. The same is true for "events that are likely to occur in the future." *The battle in*

divorces will only go on and on, with parties fighting over laundry lists of conditions.

5. **The Bill Short-Circuits the Statute that Imposes Restrictions for Subsequent Modifications to Legal Custody or Physical Placement – A Statute Which is Intended to Give Some Security to the Children.**

Current section 767.451 of the statutes deliberately places some restriction on modifications to legal custody or physical placement, *in the interest of the welfare of the children. Consequently, the law deliberately disallows any modification within the first two years after an order has been entered, unless the current custodial conditions are physically or emotionally harmful to the child.* There is a reason for this. It is to establish some security in custody and placement for at least two years – for the welfare of the children. *This bill will open the door for fights over custody and placement to go on and on and on. Similarly,* a modification of physical placement or legal custody may be done *afterwards* only if there has been a substantial change in circumstances and the modification is in the best interest of the child. This bill ignores that restriction also.

This bill allows for that process to be completely short circuited, by allowing for a condition to be imposed that transfers physical placement or legal custody on the happening of some lesser event. *The bill provides that s. 767.451 does not apply where these conditions are imposed.*

6. **The Bill Contains No Legal Standard for the Future Change in Physical Placement or Legal Custody.**

The bill contains a standard for determining when to allow for a condition to be imposed, although as described above, this is a very vague standard. *But there is no standard for the change in physical placement or legal custody when it occurs.* Under the statutes, the “best interest of the child” is the standard that is involved in determining physical placement or legal custody. *But, the current “best interest of the child” is not a consideration when the future condition finally comes to pass, relating to the subsequent transfer or award of physical placement or legal custody.*

7. **Our Recommendation for an Amendment**

The bill refers to the need to have conditional orders in some cases, citing *In re Marriage of Koeller v. Koeller*, 195 Wis. 2d 660, 666 (1995). That case involved a mother who had sole custody of two minor children and who was subsequently diagnosed with cancer. Her former husband had a history of mental illness. As a result, she wished to make a conditional order which would transfer the custody of her children to her sister “*if [the mother] dies or becomes so disabled that she is unable to care for the minor children of the parents.*” The court did not allow the conditional order, citing current law.

We do not have any difficulty with cases like this where the condition relates to the death or disability of a parent that renders the parent unable to care for the child.

Consequently, we would like to recommend the following amendment to AB 29:

767.41 (5m) MODIFICATION CONTINGENT UPON FUTURE EVENT OR CHANGE IN CONDITIONS. (a) In making an order of legal custody under sub. (2) or (3) or periods of physical placement under sub. (4), the court may ~~take into account events that are likely to occur in the future or temporary current conditions that affect the ability of one or both parties to make decisions in the best interest of the child or to perform parental duties and responsibilities or care for the child and may provide for future modifications to, or retain the option to modify at a future time, contingent upon the occurrence of a specified future event or a specified change in temporary current conditions~~ death or disability of a parent that would render the parent unable to care for the child, any of the following:

1. Legal custody.
 2. Periods of physical placement
 3. The authority to make major or other specified decisions.
- (b) Modifications to legal custody or periods of physical placement under this subsection are not subject to s. 767.325.